

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MONEY MAILER, LLC,

Plaintiff,

v.

WADE G. BREWER,

Defendant.

NO. C15-1215RSL

ORDER GRANTING IN PART
MONEY MAILER'S MOTION TO
COMPEL COMMUNICATIONS
WITH CHUCK GOURLEY

This matter comes before the Court on Money Mailer's "Second Motion to Compel Discovery" (Dkt. # 205) and Brewer's "Cross Motion for Protective Order" (Dkt. # 215). Money Mailer seeks to discover all communications between Brewer and Charles "Chuck" Gourley, Brewer's longtime friend and the Money Mailer franchise owner who introduced Brewer to Money Mailer and acted as his adviser regarding the franchise. Gourley has information regarding Brewer's interest in, knowledge of, and negotiations for a Money Mailer franchise, advised Brewer how to make the franchise profitable, and was in fairly constant communication with Brewer as his relationship with Money Mailer deteriorated and litigation ensued. Brewer asserts that he has produced all relevant, non-privileged communications between himself and Gourley (approximately 420 communications), withholding communications that were potentially responsive but were irrelevant because they "deal with the minutia of life commonly

ORDER GRANTING IN PART MONEY
MAILER'S MOTION TO COMPEL - 1

discussed amongst friends,” and providing a privilege log of communications withheld under an attorney/client, work product, and/or joint defense privilege. Dkt. # 215 at 2.

Having reviewed the memoranda, declarations, and exhibits submitted by the parties, the Court finds as follows:

A. Relevance

Brewer’s general relevance objection, pursuant to which he has withheld communications that are responsive but irrelevant, is overruled. While there are undoubtedly emails and texts with Gourley that discuss their favorite Facebook quiz or travel arrangements or other “minutia” having nothing to do with the claims or defenses asserted in this litigation, those communications are not at issue here: they need not be produced because they are not responsive to Money Mailer’s discovery requests. Money Mailer seeks communications regarding the franchise and/or Money Mailer, and Brewer offers no explanation for why communications that touch on those topics are not relevant. Unless a communication involves only the minutia of a friendship - and not the franchise and/or Money Mailer - the presumption is that it is relevant and Brewer has not overcome that presumption.

Brewer alternatively argues that communications with Gourley regarding the franchise and/or Money Mailer after the inception of the franchise are irrelevant because Brewer has waived his claim for lost profits. Brewer claims that Money Mailer sold him a franchise by misrepresenting its potential for profit, arguing that a Money Mailer franchise is simply not viable. He also seeks damages. Gourley has (or is reasonably believed to have) information relevant to what Brewer knew when entering into the franchise, how Brewer managed (or mismanaged) the franchise, and whether Brewer’s losses were caused by acts or conduct

1 unrelated to Money Mailer. Defendant's unilateral decision to abandon his claim for lost profits
2 does not make his communications with Gourley irrelevant.

3 Finally, Brewer argues that his communications with Gourley after Brewer's franchise
4 terminated on August 4, 2015, are not relevant. There is every reason to believe that Gourley and
5 Brewer continued to discuss the events giving rise to this case, potential legal claims against
6 Money Mailer, Money Mailer's potential defenses, etc. The existence of a twenty-five page
7 privilege log, 80% of which reflects communications that occurred post-termination, essentially
8 proves the point. These communications may contain reflections on past events, reveal the
9 existence of relevant documents, or contain party admissions. Any reasonable counsel would
10 want to know what the opposing party is telling his friend and business adviser about an ongoing
11 dispute: the communications are undoubtedly relevant. The issue is whether they are privileged.
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13 **B. Attorney/Client, Work Product, and Joint Defense Privileges**

14 The day after Money Mailer filed its motion to compel, Brewer produced a twenty-five
15 page privilege log. The first two pages list documents identified as "Legal Research" or
16 "Attorney Notes" and state that the basis for withholding the documents is the work product
17 doctrine.¹ Brewer's counsel at the time states that these documents reflect her legal research or
18 were prepared at her direction in the spring and summer of 2015. These twenty documents need
19 not be produced.²
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21 Brewer claims the attorney/client privilege protects from disclosure communications
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24 ¹ One entry is described as "Prepared in anticipation of litigation." Dkt. # 220-1 at 2.

25 ² To the extent Brewer withheld additional communications with Gourley based on the
26 attorney/client privilege, Dkt. # 220-1 at 5, he has not provided sufficient information regarding those
27 communications to show that the privilege applies.

1 between Brewer and Gourley between March 2015 and July 2018. Brewer argues that these
2 communications were part of a joint defense or common interest agreement through which
3 Gourley and Brewer were evaluating, defending, and/or pursuing claims arising from their
4 respective Money Market franchises. The joint defense privilege expands application of the
5 attorney/client privilege and the work product doctrine by relaxing the requirement that a
6 communication be made in confidence. It essentially prevents waiver of the privilege where
7 confidential communications are shared between parties and counsel involved in a joint defense
8 or having a common interest. *Griffith v. Davis*, 161 F.R.D. 687, 692 (C.D. Cal. 1995); *Metro*
9 *Wastewater Reclamation v. Continental Cas.*, 142 F.R.D. 471, 478 (D. Colo. 1992) (explaining
10 that the allied lawyer doctrine, is “merely an extension of the attorney-client privilege and the
11 work-product doctrine.”). The doctrine protects communications only when the communications
12 are part of an “on-going and joint effort to set up a common defense strategy.” *Eisenberg v.*
13 *Gagnon*, 766 F.2d 770, 787 (3rd Cir. 1985). *See U.S. v. Schwimmer*, 872 F.2d 237, 243 (2nd Cir.
14 1989) (explaining that “[o]nly those communications made in the course of an ongoing common
15 enterprise and intended to further the enterprise are protected.”). Where a “joint defense effort or
16 strategy has been decided upon and undertaken by the parties and their respective counsel,”
17 communications may be deemed privileged whether litigation has been commenced against both
18 parties or not. *Schwimmer*, 892 F.2d at 244.

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22 The evidence submitted by Brewer with regards to the establishment and continuation of
23 an ongoing common enterprise is remarkably thin. The privilege log describes communications
24 between Brewer and Gourley as “email communication regarding litigation,” Dkt. # 220-1 at 5,
25 or “text discussion regarding franchisee rights,” Dkt. # 220-1 at 6. Neither of these descriptions
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1 suggests that the documents reveal privileged communications or that the exchanges were made
2 pursuant to perceived common interests. Neither Brewer nor Gourley has provided a declaration
3 regarding their understanding of the context in which these communications were made.
4 Attorney Leslie Schwaebe Akins has submitted two declarations stating (a) that Brewer and
5 Gourley approached her in the spring of 2015 with concerns regarding their Money Mailer
6 franchises (Dkt. # 217 at ¶ 2) and (b) that she continues to represent Brewer in this litigation
7 (Dkt. # 217 at ¶ 3; Dkt. # 226 at ¶ 1). Ms. Akins never expressly states that she represented both
8 Brewer and Gourley, how long that representation lasted, or that the clients agreed or intended to
9 pursue a joint strategy with regards to Money Mailer, but offers to provide additional detail
10 regarding her representation for *in camera* review. Dkt. # 217 at ¶ 2. Even if these deficiencies
11 can be remedied, there is no indication that Brewer and Gourley communicated between June
12 2016 and July 2018 - more than a year after they consulted with Ms. Akins - in the context of a
13 joint defense effort or that their communications during that time meet the other requirements of
14 the attorney/client privilege or the work product doctrine.
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19 For all of the foregoing reasons, Money Mailer's motion to compel is GRANTED in part.
20 Brewer shall produce documents withheld as "potentially responsive but irrelevant" and all
21 communications between Brewer and Gourley withheld on the ground of common interest
22 privilege. Brewer shall, within fourteen days of the date of this Order, either withdraw the claim
23 of attorney/client privilege asserted as to the five documents listed at Dkt. # 220-1 at 5 or
24 produce them for *in camera* review. Brewer may submit with his *in camera* submission a more
25 detailed declaration from Ms. Akins in support of a continuing claim of privilege with regards to
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1 those five documents.

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3 Dated this 15th day of April, 2020.

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5 Robert S. Lasnik
6 United States District Judge
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